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No. 00-1751

# In the Supreme Court of the United States

OCTOBER TERM, 2001

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SUSAN TAVE ZELMAN, Superintendent
of Public Instruction, *et al.*,
*Petitioners*

v.

DORIS SIMMONS-HARRIS, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF *AMICUS CURIAE* OF HUGH CALKINS IN SUPPORT OF THE PETITION BUT URGING A NARROWER QUESTION FOR REVIEW

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## QUESTION PRESENTED

Is a student voucher plan whose purpose and principal effect is to provide improved education to low-income students in a school district characterized by high rates of educational failure valid under the Establishment Clause, when most of the students using the vouchers attend religiously-affiliated schools?

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# Supreme Court of the United States

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of Public Instruction, *et al.*,
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DORIS SIMMONS-HARRIS, *et al.*,
*Respondents*

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit**

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## BRIEF FOR HUGH CALKINS. ESQ., *AMICUS CURIAE* SUPPORTING PETITIONER BUT URGING A NARROWER QUESTION FOR REVIEW

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## CONSENT TO FILING

This *amicus curiae* brief is filed pursuant to Supreme Court Rule 37.2, with the written consent of all parties in interest. Letters of consent have been filed with the Clerk of this Court.[1]

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[1] Hugh Calkins, the *amicus curiae*, was the author of the entire brief. No person or entity made a monetary contribution to the preparation or submission of the brief.

## INTEREST OF THE *AMICUS CURIAE*

*Interest of Amicus.* Hugh Calkins, the *amicus,* was a law clerk to Mr. Justice Frankfurter in the 1950-51 term of this Court. He was an elected member of the Cleveland Board of Education from 1965 to 1969. In 1969 he was appointed by President Johnson Chair of the National Advisory Committee on Vocational Education. Upon retirement from the practice of law in 1990, Calkins obtained a teaching certificate and taught in Cleveland elementary schools, and a middle school, for four years. Following that experience, Calkins has devoted his energies to improving education in Cleveland in four principal ways. He has stimulated and helped finance improvement projects in Cleveland schools. He has encouraged improved pre-school and child care/education for children 1 to 5. He has researched and advanced proposals for improved school finance. He assisted in the formation of a charter school in inner-city Cleveland, and has served as Chair of its Board of Trustees for three years.

The interest of the *amicus* in this case is two-fold. (1) The *amicus* believes that the decision of the Court of Appeals for the Sixth Circuit was erroneous, and that the Cleveland voucher plan is a valid and valuable component of an array of programs designed to improve educational opportunity in Cleveland. He further believes that similar programs in other cities with high rates of educational failure would be valid and helpful in overcoming America's critical big city educational problem. (2) The *amicus* believes that the private choice argument relied on by Petitioner raises issues which are not presented by the facts of this case and should not be adopted by this Court in this case. (3) The *amicus* believes it may be useful to this Court for the *amicus* to present the "purpose and effect" approach to decision in the case. It is the approach which is strongly supported by the facts of the case. It avoids the problems created by the private choice view. For reasons which have not been explained, it has been largely ignored by Petitioner.



## ARGUMENT

I. ON THE RECORD IN THIS CASE, THE WRIT OF CERTIORARI SHOULD BE GRANTED LIMITED TO THE QUESTION WHETHER A STUDENT VOUCHER PLAN WHOSE PURPOSE AND PRINCIPAL EFFECT IS TO PROVIDE IMPROVED EDUCATION TO LOW-INCOME STUDENTS IN A SCHOOL DISTRICT CHARACTERIZED BY HIGH RATES OF EDUCATIONAL FAILURE IS VALID UNDER THE ESTABLISHMENT CLAUSE, WHEN MOST OF THE STUDENTS USING THE VOUCHERS ATTEND RELIGIOUSLY-AFFILIATED SCHOOLS.

A. THIS CASE FAIRLY PRESENTS ONE, AND ONLY ONE, OF THE TWO GROUNDS ON WHICH STATE FUNDING OF STUDENTS IN RELIGIOULY-AFFILIATED SCHOOLS CAN BE SUSTAINED UNDER THE ESTABLISHMENT CLAUSE.

**The two grounds are:**

1. Private choice, relied upon by Petitioner, is inappropriate in this case, because this Court's approval of private choice would validate voucher plans which extended to all students in this country. Whether such sweeping plans would violate the Establishment Clause presents questions of fact and law which are not illuminated by the facts of this case, and which have not been briefed by Petitioner.

2. This case presents a factual situation in which the validity or invalidity of the principal or primary effect ground can reliably be determined. The Cleveland Municipal School District is the only district meeting the requirement of the Ohio statute "that [it] has been the subject of a federal court order 'requiring supervision and operational management of the district by the state superintendent.'" *Simmons-Harris v. Zelman,* 234 F.3d 945, 948 (6th Cir. 2000) (hereinafter, "court below"). The record contains ample evidence of the high rate of educational failure among the district's students. See the Petition filed in his case by the State of Ohio, pp. 2-3.

By contrast, the factual setting and record in this case are not well suited to a resolution on the private choice ground. That ground is applicable to all forms of voucher or scholarship plans under which state funds support elementary and secondary students in religiously affiliated schools. A plan to provide a state voucher or scholarship to all elementary and secondary students whose parents want them to attend a religious school would raise the following issues, among others:

1. Is the purpose and primary effect of the plan educational or religious? What is the educational objective to be achieved by permitting students in demonstrably successful traditional public schools, such as those in Scarsdale or Winnetka, to transfer to religious schools? In a state which has authorized charter schools, and thus allowed parents a wide choice of non-religious schools at state expense, what is the educational purpose or effect of using state funds to enable parents to choose religiously affiliated schools as well?

2. If the religious purpose and effect predominate, can compliance with the Establishment Clause be achieved by giving parents a choice whether or not to participate in the program?

3. Would widespread availability of vouchers cause many religious communities to create schools in which the student body would primarily consist of the children of their members, with the result that many religious establishments would, with state support, develop in many parts of the country? Would such a development be contrary to the Establishment Clause?

The record in this case does not contain the facts necessary to respond to these questions, and there is no discussion of these issues in the brief of Petitioner.



## II. THE REASONS FOR GRANTING THE WRIT OF CERTIORARI ARE COMPELLING.

A. There is a clear conflict with the decision of the Supreme Court of Wisconsin in *Jackson v. Benson*, 578 N.W.2d 602 (Wisc. 1998). Since this conflict has been discussed extensively in Petitioner's brief at pages 12-17, the discussion will not be repeated here.

B. The decision of the Court of Appeals is clearly erroneous. See the discussion below at pages 6 to 9.

C. The erroneous decision of the Court of Appeals, if not reversed, will have serious adverse consequences:

1. It will cause serious harm to many of the 3800 students now supported in private schools by the Cleveland voucher plan. Some of these students may be able to enroll in one of Cleveland's charter schools. Some will belong to families who will be able to pay the full tuition at the parochial or other private school they attend. Many of these students will be required to enroll in Cleveland Municipal School District schools which are only slowly improving the quality of the education they provide.

2. The erroneous decision of the Court of Appeals, if not reversed, will discourage other states from enacting programs similar to the Cleveland program in cities with educational problems similar to Cleveland's.

D. Failure to grant the writ will, therefore, be a material setback in the national effort to overcome one of the nation's major problems - persistent failure to educate well large numbers of young people growing up in major cities.

III. UNDER ESTABLISHED SUPREME COURT JURISPRUDENCE, THIS COURT WILL NOT FORMULATE A RULE OF CONSTITUTIONAL LAW BROADER THAN IS REQUIRED BY THE PRECISE FACTS TO WHICH IT IS TO BE APPLED.

In his concurring opinion in *Ashwander v. Valley Authority,* 297 U.S. 288, 347 (1936), Mr. Justice Brandeis stated what has become a corner stone of Supreme Court jurisprudence: "The Court will not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Liverpool, N.Y. & P.S.S. Co. v. Emigration Commissioner,* [113 U.S. 33 (1885)]."

For a more recent application of the principle by this Court, see *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157 (1984).

IV. THE DECISIONS OF THIS COURT PROVIDE AMPLE SUPPORT FOR RELYING UPON THE PRINCIPAL OR PRIMARY EFFECT GROUND FOR DETERMINING THE VALIDITY OF VOUCHER PROGRAMS UNDER WHICH STATE FUNDS SUPPORT STUDENTS IN RELIGIOUSLY AFFILIATED SCHOOLS.

**A. The guiding standard in school-related Establishment Cause cases is "principal or primary effect."**

In *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1972), the Supreme Court held that a Pennsylvania statute and a Rhode Island statute were invalid under the Establishment Clause of the First Amendment to the Constitution. The challenged statutes provided state funds to private schools, most of which were church-affiliated, to be used to teach secular subjects such as mathematics, modern foreign languages, and physical sciences. In its opinion, written by Chief Justice Burger and joined or concurred in by six other members of the Court, the Court laid down what has become the governing principle:

"Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must



one that neither advances nor inhibits religion, *Board of Education v. Allen,* 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' *Walz, supra,* at 674."

The authority of this articulation of the governing principle has been recognized recently by the Supreme Court. Justice Kennedy stated in 1992 that "In only one instance, the decision in Marsh v. Chambers, 463 U.S. 783 (1953), has the Court not based its decision on the basic principles described in *Lemon.*" *Lee v. Weissman,* 505 U.S. 577, 603 fn 4 (1992). In his opinion in *School District of Grand Rapids v. Ball,* 473 U.S. 373, 383 (1985), Justice Brennan stated "We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children."

Since this Court has generally accepted legislative recitals as conclusive evidence of purpose, and entanglement rarely arises when the state support is channeled through parents, the governing principle in parent choice cases, such as this one, is the "principal or primary effect" of the challenged legislation.

The authority of *Lemon v. Kurtzman* has been recognized in this case. In its brief at page 13, Petitioner states, "in analyzing the constitutionality of these two programs (those in Wisconsin and Ohio), both the Wisconsin Supreme Court and the Sixth Circuit applied the test set forth in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), and later precedents of this Court."

A review of all of the cases decided by the Supreme Court subsequent to Lemon relating to state support for church-affiliated schools or their students shows that the outcomes of the cases, although not always the language of the decisions, are consistent with the "principal or primary effect" test, except for three decisions (*Meek v. Pittenger*, 421 U.S. 349 (1975), *Aguilar v. Felton,* 473 U.S. 402 (1985), and *School District of Grand Rapid v. Ball,* 473 U.S. 373 (1985)), which are no longer good law.

**B. Under the primary effect test, the Cleveland voucher plan is valid, and the decision of the court below should not be allowed to stand.**

Without doubt, the Cleveland voucher plan has both educational and religious effects. Educationally, it provides Cleveland youngsters and their parents with an important alternative to attending Cleveland Municipal School District schools. Most participating children enroll in parochial and other church-related schools. Other students in those schools, who do not participate in the voucher plan, are paying significant tuition and therefore typically are of more middle class, rather than low-income, backgrounds. It was reasonable for the Ohio Legislature to conclude that low-income students, enrolling in the diversified student bodies of more orderly parochial and church related schools, would receive a better education than had they remained in Cleveland public schools. See James S. Coleman *et al., High School Achievement* (Basic Books, Inc. New York 1982) at 195, where the author, a highly regarded educational researcher, describes "evidence that students from different backgrounds achieve at more nearly the same level in Catholic schools than in public (or other private) schools."

The religious effect of the Cleveland voucher plan is equally clear. The size of the subsidy is in many cases more than enough to cover the variable costs of adding students to existing classrooms with existing teachers. The fact that a high proportion of the voucher students are enrolled in preexisting, church related schools, and not in newly created schools (Brief of Petitioner p. 6), and the further fact that non-church-related voucher schools have converted to charter (called "community schools" in Ohio) status once that status was made available (Brief of State Appellants in court below p. 11), are evidence that the voucher is attractive to supplement the income of the existing schools, but inadequate to sustain new private schools. Important religious effects of the plan are that it provides financial support to parents who pay tuition to send their children to fill otherwise empty seats in church-related schools, and that it permits (subject to a required preference for low-income students) up to one-half of the children benefiting from the plan to be middle income students already enrolled in church-related schools. Ohio Rev. Code Section 3313.975(B).



If this Court grants the writ, the issue before it would be: Which of the effects, educational or religious, is "primary"?

On that question, there is no better indicator than the terms of the plan itself. The Ohio Legislature chose to limit the plan to the Cleveland Municipal School District, which it described in a convoluted way to make the legislation nominally general in application. Educational conditions in that district were so deplorable that a court had directed the takeover of the District by the State Superintendent of Public Instruction, and only 9% of the District's students passed all four sections of Ohio's ninth grade proficiency test. (Brief of Petitioner p. 2) If the purpose of the plan had been to encourage church- related education, it would have made no sense to have limited the plan to Cleveland. To the contrary, the limitation demonstrates the genuineness of the legislative purpose to relieve what was probably the most critical educational problem in the state.

What is true of purpose is also true of principal effect. The effect of the plan in giving some financial support to some church-related schools in the Cleveland area is not "primary." Its effect in placing low-income students in orderly classrooms with middle class students and thereby, hopefully, providing a better education where educational improvement is critically needed is its "primary" effect.

The Cleveland voucher plan is therefore valid under the Establishment Clause, and the decision of the Court of Appeals should not be allowed to stand.

V. FOR THE FOREGOING REASONS, THIS COURT SHOULD GRANT A WRIT OF CERTIORARI, LIMITED TO THE VALIDITY, OR NOT, OF THE CLEVELAND VOUCHER PLAN WHEN TESTED UNDER THE PRINCIPAL OR PRIMARY EFFECT STANDARD.

Writs of certiorari limited to one of several issues presented are common in the practice of this Court. See, e.g., *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 455 U.S. 988 (1982); *Blum v. Yaretsky et al.*, 454 U.S. 815 (1981); *McEloy v. United States*, 454 U.S. 815 (1981); and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 424 U.S. 908 (1976).

While less common, this Court has on occasion defined in its own words the questions it wishes the parties to address. See *Pacific Gas & Electric Co., et al. v. State Energy Resources Conservation and Development Commission et al.*, 457 U.S. 1132 (1982), where the Court's order stated:

"Certiorari granted limited to the following questions: Whether petitioners' challenges to the provisions in the 1976 amendments to California's Warren-Alquist Act, Cal. Pub. Res. Code Ann. Sections 25524.1(b) and 25524.2 (West 1977), which condition the construction of nuclear plants on findings by the State Energy Resources Conservation and Development Commission that adequate storage facilities and means of disposal are available for high-level nuclear waste, are ripe for judicial review, and whether Sections 25524.1(b) and 25524.2 are pre-empted by the Atomic Energy Act of 1954, 42 U.S.C. Section 2011 *et seq*."



## CONCLUSION

For the reasons stated above, his Court should grant a writ of certiorari in this case, limited to the validity, or not, of the Cleveland voucher plan when tested under the principal or primary effect standard.

Respectfully submitted,

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June 14, 2001